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No. 94-6615

IN THE
Supreme Court of the United States
OCTOBER TERM, 1994

CARL THOMPSON,
Petitioner,

v.

PATRICK KEOHANE, Warden,
BRUCE M. BOTELHO, Attorney General,
State of Alaska,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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REPLY BRIEF FOR PETITIONER

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ARGUMENT

1. The principal issue for decision in this case is whether the inquiry into "custody" for purposes of *Miranda v. Arizona*, 384 U.S. 436 (1966), is a factual, legal or mixed question because, as respondents recognize, the presumption of correctness embodied in 28 U.S.C. § 2254(d) "applies to 'issues of fact,' but not to 'issues of law,' or to 'mixed issues of fact and law.'" (Resp. Br. 10 (citing *Miller v. Fenton*, 474 U.S. 104 (1985)). Petitioner and respondents appear to concur on

the following points important to the determination of this ultimate issue: that the historical circumstances surrounding the interrogation—the content and context of the interview—are factual issues subject to section 2254(d)'s presumption of correctness on habeas review (*see* Pet. Br. 6, 16, 35; Resp. Br. 30-31); that the *Miranda* "custody" issue turns not on the subjective understandings of the suspect or the interrogating officers, but rather on whether, in light of all the relevant circumstances, a "reasonable person" would have understood that he or she was under arrest or that his or her freedom of movement was restrained to a degree associated with an arrest (*see* Pet. Br. 6, 15-16, 25-26; Resp. Br. 7-8, 13-15); that a court, in making this determination, is applying an objective legal test to the facts of the case (*see* Pet. Br. 6-7, 16-18; Resp. Br. 8, 13, 16); and that, should this exercise be deemed a "mixed" question of law and fact, it is not subject to the section 2254(d) presumption of correctness (Pet. Br. 8-10; Resp. Br. 10). Where petitioner and respondents part company is in isolating the applicable principles for distinguishing factual issues from mixed questions of law and fact.

2. Respondents' proposal for distinguishing between factual and mixed questions is less a standard than a means of eliminating the distinction entirely. Relying upon a civil tax case decided in 1960, respondents apparently contend that where a court is called upon to apply a legal standard to the totality of the circumstances, invoking the " 'fact-finding tribunal's experience with the mainsprings of human conduct,' " the matter should be treated as a factual issue subject to section 2254(d)'s presumption. (Pet. Br. 16 (quoting *Comm'r of Internal Revenue v. Duberstein*, 363 U.S. 278, 289 (1960)). Respondents appear to be arguing that where the determination of a legal issue is "fact-bound" (Resp. Br. 15, 19, 20, 21) or "intricately interwoven with the facts of a specific case" (Resp. Br. 8), that is, where

the ultimate determination "in any given case is peculiarly dependent on the facts" (Resp. Br. 20) and involves a "fact-specific application" of the legal standard (Resp. Br. 16), the issue should be treated as one of fact. The difficulty with this argument is that because each and every mixed question, by definition, "require[s] the application of a legal standard to the historical-fact determinations," *Townsend v. Sain*, 372 U.S. 293, 309 n.6 (1963), or, put another way, the determination of "whether the rule of law as applied to the established facts is or is not violated," *Pullman-Standard v. Swint*, 456 U.S. 273, 289 n.19 (1982), each such question is necessarily "fact-bound" and "fact-specific." Respondents' proposal functionally to erase the long-recognized distinction between historical-fact inquiries and the application of federal standards to those facts finds no support in the Court's precedents, and indeed is fundamentally at odds with them.

For example, the legal question of the voluntariness of a confession for due process purposes requires for its resolution the evaluation of myriad factual circumstances and is easily as "fact-bound" as the *Miranda* "custody" determination. *See, e.g., Withrow v. Williams*, —— U.S. ——, 113 S.Ct. 1745, 1751 (1993) ("we continue to employ the totality-of-circumstances approach when addressing" a due process voluntariness claim); *Arizona v. Fulminante*, 499 U.S. 279, 285-288 & n.2 (1991) (applying totality of the circumstances test); *see also Schneckloth v. Bustamonte*, 412 U.S. 218, 226 (1973) ("[i]n determining whether a defendant's will was overborne in a particular case, the Court has assessed the totality of all the surrounding circumstances—both the characteristics of the accused and the details of the interrogation. . . . [E]ach [such case] reflected a careful scrutiny of all the surrounding circumstances"). Nevertheless, the *Miller* Court ruled *not* that the trial court's "fact-bound" determination was subject to deference, but rather that the voluntariness inquiry is a " 'mixed ques-

tio[n] of fact and law' subject to plenary federal review." *Miller*, 474 U.S. at 112 (alteration in original) (quoting *Townsend*, 372 U.S. at 309).

Similarly, in setting forth the standard for constitutional ineffective assistance of counsel, this Court declined to provide bright-line rules, *Strickland v. Washington*, 466 U.S. 668, 688 (1984), instructing instead that "a court deciding an actual ineffectiveness claim must judge the reasonableness of counsel's challenged conduct on the facts of the particular case, viewed as of the time of counsel's conduct." *Id.* at 690; *see also id.* at 688 (in each particular case "the performance inquiry must be whether counsel's assistance was reasonable considering all the circumstances"); *id.* at 695 (in assessing the "prejudice" prong of an ineffective assistance claim, courts "must consider the totality of the evidence before the judge or jury"). Despite the fact that both the performance and the prejudice prongs of a *Strickland* ineffective assistance claim must be deemed "intricately interwoven with the facts of a specific case" (Resp. Br. 8), this Court has refused to characterize them as questions of " 'basic, primary, or historical fac[t],' " and instead has ruled that they are mixed questions of fact and law not subject to section 2254(d)'s presumption of correctness. *Strickland*, 466 U.S. at 698 (quoting *Townsend*, 372 U.S. at 309 n.6); *see also Kimmelman v. Morrison*, 477 U.S. 365, 388-389 (1986).

A claim that identification evidence was admitted against a defendant in violation of his or her due process rights also "turns upon the facts," *Neil v. Biggers*, 409 U.S. 188, 193 (1972), and "must be determined 'on the totality of the circumstances.' " *Id.* at 196; *see also Manson v. Brathwaite*, 432 U.S. 98, 114-117 (1977) (outlining a number of factual circumstances to be considered in determining whether identification testimony is unreliable under the circumstances of the case). Yet the Court has determined that the ultimate question of the

necessarily "fact-specific application" (Resp. Br. 16) of the due process standard to the facts as found is a "mixed question of law and fact that is not governed by § 2254(d)." *Sumner v. Mata*, 455 U.S. 591, 597 (1982) (*per curiam*) ("*Sumner II*"); *see also Manson*, 432 U.S. at 114-117; *Neil*, 409 U.S. at 193 n.3.

Finally, a question regarding whether a valid waiver has been made in any given case must be viewed as "peculiarly dependent on the facts" (Resp. Br. 20). The Court, however, has ruled that the application of the federal standard for determining the validity of a defendant's waiver of his or her Sixth Amendment right to counsel is not a question of fact but rather is a matter of federal law, and has reviewed the application of that standard *de novo*. *See Brewer v. Williams*, 430 U.S. 387, 403-406 (1977). The question whether a defendant's guilty plea is voluntary, and thus whether he or she truly has made an effective waiver of numerous federal rights, has also been held to constitute a question of federal law as to which the Court has exercised plenary review, not a question of fact subject to section 2254(d)'s presumption. *See Marshall v. Lonberger*, 459 U.S. 422, 431, 436-438 (1983); *see also Parke v. Raley*, —— U.S. ——, 113 S.Ct. 517, 526-527 (1992); *Brookhart v. Janis*, 384 U.S. 1, 4 & n.4 (1966) (the question whether petitioner waived his Sixth Amendment confrontation right "is, of course, a federal question controlled by federal law" as to which "we are duty bound to make an independent examination of the evidence in the record").

3. Respondents' invitation to erase the distinction between factual issues and mixed questions not only is insupportable under this Court's precedents, it is also unnecessary and unwise. As detailed in petitioner's opening brief (Pet. Br. 10-24), the Court's traditional *Townsend* approach, supplemented by *Miller*'s consideration in close cases of whether one judicial actor is better positioned

than another to decide the issue in question, provides a construct that is both workable and consistent with the "sound administration of justice." *Miller*, 474 U.S. at 114. Respondents' attempts to escape the conclusion compelled by the Court's traditional and functional analyses—that the *Miranda* "custody" question is a mixed question of law and fact—cannot withstand scrutiny.

4. The analytical starting point must be the general distinction that was articulated in *Townsend*, that was presumptively incorporated by Congress in the 1966 amendment that added section 2254(d) (*see* Pet. Br. 13-14 n.8), and that has been employed by this Court in a progression of post-1966 habeas cases. Section 2254(d)'s presumption applies to "basic, primary, or historical facts" " 'in the sense of a recital of external events and the credibility of their narrators,' " *Townsend*, 372 U.S. at 309 n.6 (quoting *Brown v. Allen*, 344 U.S. 443, 506 (1953) (opinion of Frankfurter, J.)), but not to "[s]o-called mixed questions of fact and law, which require the application of a legal standard to the historical-fact determinations," *Townsend*, 372 U.S. at 309 n.6. *See, e.g., Miller*, 474 U.S. at 111-112; *Strickland*, 466 U.S. at 698; *Cuyler v. Sullivan*, 446 U.S. 335, 341-342 (1980); *Brewer*, 430 U.S. at 403-404; (Pet. Br. 12-13). Given petitioner's acknowledgement that the historical circumstances surrounding the interrogation are factual findings subject to section 2254(d)'s presumption (Pet. Br. 6, 16, 35), both parties' agreement as to the applicable legal standard (Pet. Br. 15-16, 25-27; Resp. Br. 13-16), and respondents' concession that the *Miranda* "custody" determination involves the application of an objective legal standard to the facts (Resp. Br. 7-8, 13), the "custody" inquiry is a mixed question of law and fact: "the historical facts are admitted or established, the rule of law is undisputed, and the issue is whether the facts satisfy the . . . standard, or to put it another way, whether the rule of law as applied to the established facts is or is not violated." *Pullman-Standard*, 456 U.S.

at 289 n.19; *see also Brewer*, 430 U.S. at 403-404; *Townsend*, 372 U.S. at 309 n.6.

5. As was explained in petitioner's opening brief (Pet. Br. 16, 33-35), the Court has treated as questions of fact the issues of competency and juror bias which, although essentially questions of historical fact, nominally involve the application of a legal standard. *See Wainwright v. Witt*, 469 U.S. 412, 426-429 (1985); *Patton v. Yount*, 467 U.S. 1025, 1036-1039 & nn. 12, 14 (1984); *Rushen v. Spain*, 464 U.S. 114, 120 (1983) (*per curiam*); *Maggio v. Fulford*, 462 U.S. 111, 113, 117-118 (1983) (*per curiam*). Respondents' attempts to portray these cases as altering the Court's general standards with respect to mixed questions (Resp. Br. 27-28), cannot be reconciled with the Court's precedents. *See supra*, page 6; (Pet. Br. 12-13, 23-24). *Miller* makes clear that the "case-specific holdings" of *Witt, Patton, Rushen and Maggio* (*Miller* 474 U.S. at 112-113), did not, as respondents imply (Resp. Br. 27), tacitly overrule prior precedents, *see Miller*, 474 U.S. at 113, or supplant the Court's traditional analysis discussed above. Rather, the issues of competency and juror impartiality represent the "close questions" (*id.* at 114), at the very edge of the fact/law spectrum, and the Court's supplemental functional analysis dictates that these essentially factual inquiries be treated as questions of fact. *See id.* at 114-115, 116-117.

6. The competency and juror bias issues are in the nature of factual issues better left to trial court determination in three fundamental respects: the "application" of the relevant legal standards constitutes little more than the ascertainment of historical facts relating to a particular actor's state of mind; these factual issues require for their resolution trial judges' particular expertise in assessing witness credibility; and the finding of these facts does not have precedential significance in further defining the meaning of the applicable legal standard. *See, e.g., Witt*,

469 U.S. at 428-429 (in excluding prospective jurors for possible bias, "[t]he trial judge is of course applying some kind of legal standard to what he sees and hears, but his predominant function in determining juror bias involves credibility findings whose basis cannot be easily discerned from an appellate record." Findings regarding a venireman's "state of mind" are "based upon determinations of demeanor and credibility that are peculiarly within a trial judge's province."); *Patton*, 467 U.S. at 1036-1038 & nn. 12, 14 (application of the constitutional standard for juror impartiality, whether a juror "can lay aside his opinion and render a verdict based on the evidence presented," mirrors an issue of historical fact: "did a juror swear that he could set aside any opinion he might hold and decide the case on the evidence, and should the juror's protestation of impartiality have been believed"; this determination "is essentially one of credibility, and therefore largely one of demeanor," to which reviewing courts should defer); *Rushen*, 464 U.S. at 120, 121-122 n.6 (the trial court is better positioned to make credibility determinations necessary to determine historical facts regarding the "substance of the [juror's] *ex parte* communications" and "their effect on juror impartiality"); *Maggio*, 462 U.S. at 113, 116-118 (habeas court is not at liberty to substitute its own judgment as to the credibility of witnesses upon which the determination of defendant's competency to stand trial is based).[1]

[1] Although the determination of issues of intent may require the application of legal rules governing the allocation of burdens and ordering of presentation of proof, and thus may arguably be termed "mixed" issues, the ultimate question generally is one of simple historical fact regarding an actor's actual state of mind. *See, e.g., United States Postal Service Bd. of Govs. v. Aikens*, 460 U.S. 711, 713-716 (1983); *Pullman-Standard v. Swint*, 456 U.S. 273, 285-290 (1982). As the Court has recognized, therefore, it is best classified as a pure question of fact. *See, e.g., id.* at 286-290 (discriminatory intent requires a finding of "actual motive" and is, although an "ultimate" fact, a pure question of fact, not a legal or mixed question); *Hernandez v. New York*, 500 U.S. 352, 364-367 (1991) (plurality opinion) (whether a prosecutor intended to discriminate in excluding possible jurors is a question of fact; "[t]he credibility of the prosecutor's explanation goes to the heart of the equal protection analysis, and once that has been settled, there seems nothing left to review").

No amount of stretching (Resp. Br. 20-24, 26-29) can make the functional rationale underlying the Court's treatment of competency and juror bias issues cover the *Miranda* "custody" inquiry.

a. First, respondents acknowledge that the determinative "custody" inquiry is what a "reasonable person" would have believed his or her position to be under the circumstances (*see* Resp. Br. 7, 33), and do not attempt to argue that the trial judge will be able to divine a fictitious person's state of mind. The "custody" standard therefore does not merely echo an essentially factual question, as the ultimate issue of what a reasonable person would have believed in the circumstances is an inherently legal inquiry not susceptible to historical determination. *See* (Pet. Br. 16-18).

b. Second, as respondents evidently concede (*see* Resp. Br. 17-18, 22), it is principally the fact that trial courts are better positioned to make, and more experienced in making, assessments of witness veracity and demeanor that requires that deference be accorded those virtually determinative assessments in the juror bias and competency cases. *See supra*, pages 7-8; *Miller*, 474 U.S. at 114 ("When, for example, the issue involves the credibility of witnesses and therefore turns largely on an evaluation of demeanor, there are compelling and familiar justifications for leaving the process of applying law to fact to the trial court and according its determinations presumptive weight. *Patton v. Yount* . . . and *Wainwright v. Witt* . . . are illustrative.").

Respondents argue, and petitioner agrees, that "[i]n the *Miranda* context, the demeanor of the officer and the defendant play an important role in determining what

happened before, during and after the interview." (Resp. Br. 20). The concerns underlying section 2254(d) and the Court's traditional deference to findings that reflect assessments of credibility therefore dictate that the presumption of correctness be applied to the finding of these foundation facts. (Pet. Br. 35). The important point, however, is that *unlike* the competency and juror bias cases, the ultimate *Miranda* "custody" determination is not, and indeed under the Court's "reasonable person" analysis cannot be, a product of credibility determinations. *Cf. Miller*, 474 U.S. at 116-117 ("unlike the impartiality of a given juror, *Patton v. Yount* . . ., or competency to stand trial, *Maggio v. Fulford* . . ., assessments of credibility and demeanor are not crucial to the proper resolution of the ultimate issue of 'voluntariness' "). Rather, a "custody" ruling reflects an objective judgment about the legal significance of the accepted, demeanor-dependent facts.[2]

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[2] Because credibility assessments clearly are not "crucial" to the ultimate question of *Miranda* "custody," *Miller*, 474 U.S. at 116-117, the Court has had no difficulty deciding *de novo* the "custody" questions in its cases based on the record facts. Contrary to respondents' suggestion (Resp. Br. 24-26), the Court has exercised plenary review over the *Miranda* "custody" issue, and has not merely corrected lower courts' use of erroneous legal standards. (Resp. Br. 24-26). Perhaps the clearest example is *Berkemer v. McCarty*, 468 U.S. 420 (1984), in which the Court addressed and decided the "custody" question relating to the respondent's pre-arrest statements even though *no* legal standard had been applied to the question below because the lower courts had not reached it. (Pet. Br. 21 & n.12). Most frequently the Court, rather than correcting the lower court's "erroneous legal standard" (Resp. Br. 25) and remanding for further "factfinding" under the proper standard, as would be appropriate if *Miranda* "custody" were indeed a question of fact, has instead independently applied the legal standard to the facts and decided the "custody" issue *de novo*, *see, e.g., California v. Beheler*, 463 U.S. 1121, 1122-1126 (1983) (*per curiam*); *Oregon v. Mathiason*, 429 U.S. 492, 495-496 (1977), sometimes without even setting forth the legal standard applied below or the lower court's reasoning, *see, e.g., Pennsylvania v. Bruder*, 488 U.S. 9, 10-11 (1988) (*per curiam*); *Orozco v. Texas*, 394 U.S. 324, 326-327 (1969); *Mathis v. United States*, 391 U.S. 1, 3-5 (1968).

In such circumstances, the Court's precedents make clear that reviewing courts must presume the correctness of the demeanor-dependent facts but independently evaluate the significance of those facts under prevailing federal legal standards. For example, credibility questions may be central in determining the reasons behind a lawyer's failure to take certain steps in representing a criminal defendant for purposes of an ineffective assistance of counsel claim, the actual events surrounding the inducement of a plea of guilty for purposes of a challenge to the voluntariness of the plea, the circumstances underlying a challenged lineup for purposes of contesting the reliability of identification evidence, the factual context underlying a claim of multiple representation, or the facts pertinent to a claim that a defendant was coerced into waiving his Sixth Amendment right to counsel. Credibility questions are also often critical in settling the context of a due process challenge to the voluntariness of a confession, where the legal standard—whether the confession was in fact the product of a "free and rational will" (*Miller*, 474 U.S. at 110)—relies to an extent on a determination of actual state of mind. Accordingly, this Court has, in each of the above-described contexts, deferred to the trial court's finding of the "historical" foundation facts, but has mandated plenary federal review of the ultimate mixed question presented. *See, e.g., Strickland*, 466 U.S. at 698; *Marshall*, 459 U.S. at 431-432, 436-438; *Sumner II*, 455 U.S. at 597; *Cuyler*, 446 U.S. at 341-342; *Brewer*, 430 U.S. at 397 n.4, 403-404.

c. Finally, the issues of competency and juror bias essentially turn on the determination of a single historically ascertainable fact concerning the state of mind of a particular actor, and the resolution of those issues in a particular case generally will not result in the elaboration of the basic legal standard applied or provide guidance

for the primary conduct of others in future. In sharp contrast to such issues, whose determination is akin to factfinding in effect as well as in practice, the process of applying the *Miranda* "custody" standard itself constitutes law declaration, and its effect is to yield precedents that have provided concrete guidance for future cases.

The caselaw demonstrates that there are discrete, recurring factual contexts in which the *Miranda* "custody" issue arises, for example, stationhouse questioning, roadside stops, and the questioning of incarcerated suspects. Because what constitutes "custody" in all these situations "'cannot be fully encompassed in one infallible definition,'" "'[i]nevitably, its outer limits will be marked out through case-by-case adjudication.'" *Bose Corp. v. Consumers Union of U.S., Inc.*, 466 U.S. 485, 503 (1984) (discussing First Amendment "actual malice" issues) (quoting *St. Amant v. Thompson*, 390 U.S. 727, 730-731 (1968)). This process of applying the general "custody" standard to the facts in discrete contexts has provided specific guidance for courts, and for law enforcement as to the meaning of *Miranda* "custody." *See, e.g.*, (Pet. Br. 30-31) (stationhouse questioning); *Pennsylvania v. Bruder*, 488 U.S. 9 (1988) (*per curiam*) (roadside questioning); *Berkemer v. McCarty*, 468 U.S. 420 (1984) (same); *United States v. Menzer*, 29 F.3d 1223, 1230-1233 (7th Cir.) (deciding "custody" issue in relation to an incarcerated suspect based on caselaw addressing "custody" issue in prison context), *cert. denied*, —— U.S. ——, 115 S.Ct. 515 (1994); *Garcia v. Singletary*, 13 F.3d 1487, 1489-1491 (11th Cir.) (same), *cert. denied*, —— U.S. ——, 115 S.Ct. 276 (1994); *United States v. Cooper*, 800 F.2d 412, 414-415 (4th Cir. 1986) (same). Further, the evaluation in particular cases of the relevance and weight of certain recurring factors that arise in different contexts—whether the investigation has focused on a defendant and whether the interrogating officers have a subjective intent to hold the defendant, for example—demonstrably has influenced fu-

ture cases. *See, e.g.*, (Pet. Br. 25-26, 30-31); *United States v. Griffin*, 922 F.2d 1343, 1347-1357 (8th Cir. 1990) (isolating relevant factors from caselaw and resolving "custody" question by analogy to prior precedents); *United States v. Baird*, 851 F.2d 376, 380-382 (D.C. Cir. 1988) (deciding "custody" question by analogy to Court's precedents); *United States v. Bengivenga*, 845 F.2d 593, 595-597 (5th Cir.) (abandoning four factor "custody" test as inconsistent with this Court's precedents), *cert. denied*, 488 U.S. 924 (1988).

Where, as here, "the relevant legal principle can be given meaning only through its application to the particular circumstances of a case," plenary review of this law-making function is imperative for reasons of sound judicial administration. *Miller*, 474 U.S. at 114; *see also Bose*, 466 U.S. at 502 (plenary review appropriate where "the content of the rule is not revealed simply by its literal text, but rather is given meaning through the evolutionary process of common-law adjudication"). As was explained in petitioner's opening brief and unrebutted in respondents' submission, *de novo* review of the application of the *Miranda* "custody" standard is necessary to further the "goal of doctrinal coherence advanced by independent appellate review." *Salve Regina College v. Russell*, 499 U.S. 225, 234 (1991). Given that "deferential appellate review invites divergent development of . . . law among the federal trial courts," (*id.*), the plenary review of *Miranda* "custody" issues will also ensure uniform and predictable legal standards to guide the conduct of law enforcement. In short, *Miranda* "custody" is, by traditional definition, a "mixed" question of law and fact, and functional considerations, far from counselling that the issue be treated as an exceptional case, reinforce the wisdom of that result.[8]

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[8] Respondents also argue that petitioner's reading of *Townsend* is too broad in that it would render virtually all issues subject to plenary review. (Resp. Br. 26-27). Respondents' hyperbole cannot

7. Finally, respondents contend that, however the *Miranda* "custody" question is classified for purposes of review on direct appeal, policy considerations peculiar to habeas review and the nature of *Miranda* claims require that the "custody" issue be treated as a question of fact on collateral attack. (Resp. Br. 34-38). Respondents' suggestion is fundamentally at odds with this Court's precedents, and is insupportable as a matter of judicial administration.[4]

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disguise the fact that there obviously exists a discrete—and voluminous—category of purely factual issues whose determination is accorded appropriate deference on direct and habeas review. Indeed, respondents have identified a wealth of such basic factual issues in the "custody" context alone. *See* (Resp. Br. 14-15). More importantly, the volume of such issues should be irrelevant to their principled treatment under existing law. It was the intent of Congress that the many "factual issues" resolved at the trial court level be presumed correct on habeas review (*see* Pet. Br. 8-9, 13 n.8), but, as this Court has repeatedly recognized, that presumption does not apply to mixed issues—whether they be plentiful or few (*see* Pet. Br. 9-10 & n.6).

[4] Respondents' argument that the *Miranda* "custody" standard should be treated differently because it is "not mandated by the Constitution" or integral to due process (Resp. Br. 34-38) should not long detain the Court. Claims based on *Miranda* have a sufficient nexus to the Fifth Amendment rights that decision serves to be heard on habeas review. *See Withrow v. Williams*, —— U.S. ——, 113 S.Ct. 1745, 1752 (1993). In *Withrow*, although the Court accepted for purposes of the case the premise that *Miranda*'s safeguards are "nonconstitutional" in character, (*id.* at 1752), it made clear that "'[p]rophylactic' though it may be, in protecting a defendant's Fifth Amendment privilege against self-incrimination *Miranda* safeguards 'a fundamental *trial* right'" that impacts the "correct ascertainment of guilt." *Id.* at 1753 (emphasis in original) (citation omitted). The *Miranda* rule, if not itself constitutionally mandated, guards fundamental constitutional rights, and "[t]he constitutional values protected by the rule make it imperative that judges—and in some cases judges of this Court—make sure that it is correctly applied." *Bose Corp. v. Consumers Union of U.S., Inc.*, 466 U.S. 485, 502 (1984) (discussing "actual malice" standard). Finally, there is no basis in the logic of the Court's *Townsend* and *Miller* analyses for distinguishing between constitutional and

The determinative issue, according to section 2254(d) and this Court's precedents, is whether *Miranda* "custody" is a question of law, fact, or a mixed question of law and fact. *See* (Pet. Br. 8-13). In deciding the issue of the proper characterization of voluntariness claims in *Miller*, the Court rejected a proposed distinction between cases arising on habeas review as opposed to direct appeal. *See Miller*, 474 U.S. at 110-111. Further, this Court and many lower courts in later *direct* appeal cases simply accepted the *Miller* Court's characterization of the voluntariness question on *habeas* review, and exercised plenary review over that question. *See, e.g., Fulminante*, 499 U.S. at 287 (on direct review of a due process voluntariness challenge in a state criminal case, the Court stated that "'the ultimate issue of "voluntariness" is a legal question requiring independent federal determination,'" quoting *Miller*, 474 U.S. at 110); *Fulminante*, 499 U.S. at 303 (Rehnquist, C.J., dissenting) (same).[5]

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quasi-constitutional claims. *See infra*, pages 15-19; *cf. Hernandez*, 500 U.S. at 366 (plurality opinion) ("The reasons justifying a deferential standard of review in other contexts . . . apply with equal force to our review of a state trial court's findings of fact made in connection with a federal constitutional claim.").

[5] Sometimes at the request of the Government, *see United States v. Cichon*, 48 F.3d 269, 275 (7th Cir.) (noting that in an appeal by the Government, the United States "has argued with great vigor" for *de novo* review of a voluntariness claim), *petition for cert. filed*, No. 94-9315 (May 18, 1995), many courts have applied, on the strength of *Miller*, *de novo* review to due process voluntariness challenges on direct appeal. *See, e.g., United States v. Anderson* 929 F.2d 96, 99 (2d Cir. 1991); *United States v. Baird*, 851 F.2d 376, 379-380 (D.C. Cir. 1988); *United States v. Wauneka*, 842 F.2d 1083, 1087 (9th Cir. 1988); *United States v. Fraction*, 795 F.2d 12, 14 (3d Cir. 1986); *United States v. Wilson*, 787 F.2d 375, 380 (8th Cir.), *cert. denied*, 479 U.S. 857 (1986); *Gray v. Commonwealth*, 233 Va. 313, 342-325, 356 S.E.2d 157, 163, *cert. denied*, 484 U.S. 873 (1987).

The Court's refusal to draw the distinction respondents seek is well warranted, as such a distinction would be inconsistent with the logic of the Court's analysis in separating questions of fact from legal or mixed questions for purposes of ascertaining the appropriate standard of review of judicial determinations. It is difficult to conceive how, consistent with the Court's analysis, an issue which is clearly one of law or a mixed question under *Townsend*'s definitions may be transformed into one of fact simply by virtue of the jurisdictional basis of a court's decision-making power. *See Hayes v. Kincheloe*, 784 F.2d 1434, 1436 (9th Cir. 1986), *cert. denied*, 484 U.S. 871 (1987); Brief of Amicus Curiae on the Merits In Support of Respondents of the Attorney General for the State of Florida 7 ("a 'factual' issue does not metamorphose into a 'legal' issue just because the proceeding changes"), 9.

Nor can a jurisdictional distinction be reconciled with the *Miller* Court's functional analysis, which dictates that the relevant inquiry is whether deference should be accorded trial courts' determinations of certain nominally "mixed" questions because trial courts, whether state or federal, are in an "appreciably better position" to decide the issues due to their essentially factual nature. *Miller*, 474 U.S. at 117. It would "surely pervert the concept of federalism," *Bose*, 466 U.S. at 499, to hold that a state trial court is appreciably better suited to resolve such questions than a federal reviewing court for purposes of habeas review, but that a federal district court is not equally qualified because the case arises on direct appeal.

Accordingly, this Court has often applied the same analytical principles in determining whether an issue is one of fact, law or a mixed question, regardless of the nature of the case, relying on its direct appeal precedents in habeas cases, *see, e.g., Miller*, 474 U.S. at 110-111, and its habeas precedents in direct appeal cases, *see, e.g., Fulminante*, 499 U.S. at 287; *Hernandez v. New York*, 500 U.S. 352, 365-369 (1991) (plurality opinion), as well as citing its civil precedents in criminal cases, *see, e.g., id.* at 364-370; *Miller*, 474 U.S. at 113-114; *see also* (Resp. Br. 16, 20-24) (relying on civil precedents), and its criminal precedents in its civil cases, *see, e.g., Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 403 (1990); *Pierce v. Underwood*, 487 U.S. 552, 559-560 (1988).

The Court's rejection of jurisdictional distinctions is not only analytically sound, it is also supported by strong considerations of judicial administration. The circuits are split on the proper characterization of a range of issues,[6]

[6] For example, respondents rely in their brief on cases holding that the voluntariness of a *Miranda* waiver is a question of fact. *See, e.g.*, (Resp. Br. 18-19). However, a number of circuits have held this issue to be a mixed question, subject to *de novo* review. *See, e.g., Alston v. Redman*, 34 F.3d 1237, 1253 (3d Cir. 1994) (voluntariness of a *Miranda* waiver is a mixed question subject to plenary review), *cert. denied*, —— U.S. ——, 115 S.Ct. 1122 (1995); *Collazo v. Estelle*, 940 F.2d 411, 415-416 (9th Cir. 1991) (voluntariness of a *Miranda* waiver is a mixed question reviewed *de novo* but intelligent and knowing quality of waiver are factual questions), *cert. denied*, 502 U.S. 1031 (1992); *Ahmad v. Redman*, 782 F.2d 409, 413 (3d Cir.) (voluntariness of *Miranda* waiver is a mixed question reviewed *de novo*), *cert. denied*, 479 U.S. 831 (1986); *see also Toste v. Lopes*, 861 F.2d 782, 783 (2d Cir. 1988) ("[t]he validity of a [*Miranda*] waiver is a matter for independent federal determination"), *cert. denied*, 490 U.S. 1112 (1989).

The circuits are also divided on the proper characterization of the question whether a "seizure" has occurred for Fourth Amendment purposes. *See, e.g., United States v. Wilson*, 953 F.2d 116, 121 (4th Cir. 1991) (question of fact subject to clearly erroneous review); *United States v. McKines*, 933 F.2d 1412, 1424-1426 (8th Cir.) (*en banc*) (question of law), *cert. denied*, 502 U.S. 985 (1991); *United States v. Valdiosera-Godinez*, 932 F.2d 1093, 1098 n.1 (5th Cir. 1991) (question of fact subject to clearly erroneous review), *cert. denied*, —— U.S. ——, 113 S.Ct. 2369 (1993); *United States v. Montilla*, 928 F.2d 583, 588 (2d Cir. 1991) (question of law reviewed *de novo*); *United States v. Maragh*, 894 F.2d 415, 417-418 (D.C. Cir.) (question of law reviewed *de novo*), *cert. denied*, 498 U.S. 880 (1990).

and doubtless will rely upon the analysis articulated in this case when separating law from fact in other criminal-law contexts. *See, e.g., United States v. Cruz*, 910 F.2d 1072, 1078 & n.2 (3d Cir. 1990), *cert. denied*, 498 U.S. 1039 (1991); *Martin v. Kemp*, 760 F.2d 1244, 1247 (11th Cir. 1985). Were the fact/law allocation to be based, as respondents suggest, on a hostility toward habeas review of *Miranda* claims, in addition to the definitional analysis and functional considerations presently employed, it would simply compound the difficulty of drawing distinctions already deemed "elusive," *Miller*, 474 U.S. at 113, and " 'vexing,' " *Bose*, 466 U.S. at 501 (quoting *Pullman-Standard*, 456 U.S. at 288).[7]

[7] Respondents also take issue with petitioner's summary of the decisions of the circuit courts, in part because respondents misapprehend petitioner's analysis. The heart of the issue presented is whether *Miranda* "custody" is a question of law or fact or a mixed question; from that determination, the appropriate standard of review to be applied should be clear under section 2254(d) and this Court's precedents. *See* (Pet. Br. 8-10; Resp. Br. 10). Far from equating the clearly erroneous standard of review with *de novo* review (Resp. Br. 21 n.6), petitioner agrees that the application of the clearly erroneous standard of review presumably is functionally equivalent to review for fair support in the record. However, petitioner did not collapse, as respondents do, the two questions—the characterization of the "custody" issue and the standard of review applied—and assume from the latter a determination regarding the former (*see, e.g.*, Resp. Br. 12, 29-30). Petitioner's summary of the circuit court precedents therefore isolates those that address the determinative issue—the correct characterization of *Miranda* custody as a factual, legal or mixed question—and demonstrates that nine circuits have done so, whether on direct or habeas review. *See* (Pet. Br. 18-19 n.10); *see also supra*, pages 15-18 (characterization of issues should be the same on direct and habeas review). For the sake of completeness, petitioner also attempted to provide the Court with a sampling of cases in each circuit demonstrating the confusion in and among the circuits—those that have addressed the characterization issue and those that have not—in applying the appropriate standard of review. *See* (Pet. 18-19 nn.10, 11).

Consideration of the most recent precedents in the Tenth and Eleventh Circuits cited in petitioner's opening brief (Pet. Br. 18-19 n.10) may also cure respondents' disagreement with petitioner's characterization of the positions of those circuits (Resp. Br. 12). *See Tenth Circuit*: *United States v. Griffin*, 7 F.3d 1512, 1516-1519 (10th Cir. 1993) (indicating that the "custody" inquiry presents a legal issue that it reviewed *de novo*); *United States v. Wynne*, 993 F.2d 760, 764-765 (10th Cir. 1993); *Eleventh Circuit*: *United States v. Adams*, 1 F.3d 1566, 1575 (11th Cir. 1993), *cert. denied*, —— U.S. ——, 114 S.Ct. 1310 (1994) (stating, in reversing the trial court's determination that the defendant was not in custody for *Miranda* purposes, that "[t]he district court's findings of fact regarding the motion to suppress are to be respected unless clearly erroneous, but the application of law to those facts is reviewed de novo" and citing *Jacobs v. Singletary*, 952 F.2d 1282, 1291 (11th Cir. 1992) (on habeas review, *Miranda* "custody" is a mixed question reviewed *de novo*)).

CONCLUSION

For the foregoing reasons and those stated in our opening brief, the judgment of the court of appeals should be reversed.

Respectfully submitted,

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